

STATE BOARD OF EQUALIZATION

OFFICE CORRESPONDENCE

185.0080

Place: Sacramento
Date: February 16, 1959

To: Mr. E. H. Stetson

From: George A. Trigueros

Re: K--- C. S---
J--- G. R--- Company
XXX --- Street
--- --- X

Account -- XXXXXX

I have reviewed the petition for redetermination of the above-named, in which application of tax to sales of two boats was contested. It is my opinion that the sales should be regarded as retail sales made by the broker as retailer.

1. In the case of the sale of a boat on September 25, 1956, to P--- M---, the facts indicate that the boat was actually the property of taxpayer when it was sold. A purchase order, dated June 9, 1956, indicates that the former owner was allowed \$19,000 for the boat on the purchase of a new boat.

The invoice for the new boat, dated August 24, 1956, also shows the \$19,000 allowance, and taxpayer's records show that the boat in question was received as a trade-in.

The sale of the boat to P--- apparently took place after taxpayer had allowed credit to the former owner, the purchase order respecting this boat having been dated September 17, 1956, three weeks after taxpayer allowed the former owner credit for it as a trade-in.

The purchase order signed by P--- indicates the sale price as \$19,000, with \$7,000 allowed for a trade-in. The traded-in boat was sold by taxpayer within a month for \$4,273.60.

Our auditor has reported that P---'s representative never met the former owner, that he received title from one of taxpayer's salesmen, that payment was made to taxpayer, and that at the time of sale, the boat was moored at taxpayer's dock. Taxpayer's sales account was credited in the amount of \$19,000, and \$19,000 was included in sales reported for income tax.

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It is my opinion that taxpayer's activities with respect to this boat establish that it was the owner when it sold it to P--- M--- or, at the very least, that it had power to vest title in another and did so within the meaning of the Attorney General's Yacht Broker opinion.

2. The facts with respect to the sale of a boat on June 26, 1956, to W--- S--- are somewhat ambiguous. Taxpayer had an exclusive listing and the boat was moored at taxpayer's dock. The former owner informed the auditor that the certificate of ownership was mailed to taxpayer for delivery to the purchaser. At the preliminary hearing, taxpayer stated that certificate of ownership was transferred directly from the former owner's bank to the purchaser's bank.

The significant fact, however is that taxpayer executed a conditional sales contract as seller. Taxpayer asserts that the bank required him to sign as seller, but that he transferred it to the bank without recourse.

It is my opinion that taxpayer's signing of the conditional sales contract as seller resulted in the transfer of the former owner's interest to the purchaser. Thus, taxpayer had the power to transfer title and exercised it.

3. At the Board hearing taxpayer cited Section 2100 and 2153 of the Administrative Code as having some bearing on the application of tax. Section 2100 contains the definition of an open listing, which is an agreement between the owner of a vessel and a broker which authorizes the broker to negotiate the sale, trade or exchange of the vessel, but which reserves to the owner the right to negotiate himself or to enter into open listings with other brokers, without being liable for a commission to the broker.

It is my opinion that in this case the yacht broker's sales tax liability does not depend on whether he hold an open or exclusive listing, but rather on whether, by his own act, he had the power to vest ownership in another.

Section 2153 of the Administrative Code provides that brokers must place all funds entrusted to them by principals or others, in escrow, in the hands of principals or in a trust account. Records must be kept of funds kept in such account which indicate the source of moneys, dates received, deposited and withdrawn.

It is my opinion that the fact that a broker deposits, in a trust account, funds received from a purchaser of a boat does not necessarily establish that the broker received the funds in a nontaxable transaction.

4. In considering this matter I have compared the operations of yacht brokers with the operations of automobile brokers, factors, sellers on consignment, etc.

We have considered brokers generally as retailers under Ruling 39, where they possess tangible personal property for the purpose of sale. Ruling 39 would appear to be equally

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applicable to factors who have possession of property and authority to sell. We have also considered an automobile broker as a retailer where he found a dealer, who sold a car to the customer, and the broker charged a commission. The entire charge to the customer, including the broker's commission, was considered as his gross receipts (the broker was entitled to tax-paid purchases resold ~~and~~ deduction, however).

It is my opinion that a broker in possession of an automobile who is given the authority to sell it, has the power to transfer title, even though the pink slip is not endorsed over to him or if the pink slip is merely signed in blank. In the case of Kenny v. Christiansen, 200 Cal. 419, the court held that the registered owner, who placed a car in the possession of a factor, could not assert the buyer's failure to comply with the statute requiring issuance of a certificate of registration and ownership to defeat the buyer's right of ownership. It would seem that a corollary to the rule of this case is that, since a factor has the power to create an ownership interest in a bona fide purchaser of an automobile, he, ipso facto, has "power to vest title in another."

The Certificate of Award, which is the yacht owner's equivalent of a pink slip, contains a bill of sale form on the back, which is similar to the provisions on the back of automobile certificates of registration. It is my opinion, where the owner signs the bill of sale and gives it to the broker, authorizing him to sell at a stated price, that the owner has invested the broker with power to create an ownership interest in the purchaser, as in the Christiansen case.

5. It is my opinion that yacht brokers, who do more than merely bring buyer and seller together, come within the definition of retailers under Section 6015, and should be considered as retailers to the same extent as auctioneers. Perhaps, in view of the Yacht Broker's opinion, Section 6015 should be amended to include all brokers who receive any commission for negotiating sales of tangible personal property.

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